The Solicitors' Journal

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CURRENT TOPICS

The Late Mr. A. E. Messer

THE death of Mr. ALLAN ERNEST MESSER, C.B.E., on 4th June, 1954, at the age of 88, deprives the solicitors' profession of one of its most distinguished ornaments. In addition to being senior partner in Lawrance, Messer and Co., of London, he had acted as legal adviser in the Ministry of Munitions in the 1914–18 war, he was secretary and agent of the administrative trustees of the Chequers Trust under the Chequers Estates Act, 1917, and was a director of the Guildhall Insurance Company, Ltd. At St. John's College, Oxford, he was White Foundation Scholar and was awarded a first in Mathematics Moderations and a second in law finals. In 1886 he rowed for Oxford, in 1887 he was articled to Mr. W. J. Bruty, and after his admission in 1891 he went to practise at Georgetown in British Guiana.

Recall of Judicial Order before Entry

THERE can be no doubt that the parties in three applications reported together in *The Times* of 20th May were unfortunate "in the events which happened," as the conveyancers say. So near, and yet, likewise, so far. The purpose of the application in each case had been to obtain the court's approval of a scheme for revision of a family trust. We have the authority of LORD SIMONDS (*Chapman* v. *Chapman* [1954] 2 W.L.R., at p. 728) for saying that the judges of the Chancery Division have in recent years entertained jurisdiction to make orders in chambers sanctioning on behalf of infant beneficiaries schemes involving the alteration of trusts where the object was to secure some adventitious benefit, such as the alleviation of the tax burden on the trust fund. *Chapman's* case challenged the power of the court so to alter a declared trust. Accordingly the three applications in point were postponed by ROXBURGH, J., for at the time when they were ripe for argument the decision of the House of Lords in *Chapman* v. *Chapman* stood reserved. Then the Court of Appeal indicated (in another case) that the pendency of the *Chapman* case was not a sufficient reason for delay. Roxburgh, J., therefore heard the summonses and, acting on the law as then declared by the majority of the Court of Appeal, approved the three schemes. But the glorious uncertainty of litigation, even of the non-contentious kind, had not received its final demonstration. After the orders had been pronounced, but before they had been perfected by entry in the registrars' chambers, there was published their lordships' decision in *Chapman* v. *Chapman*. There never had been jurisdiction to make orders of the kind in question except on the compromise of genuine disputes and for a few other limited purposes. Hence Roxburgh, J., directed that the registrars should not further proceed with the orders, but that the parties should be invited to attend again upon the judge. After further argument the learned judge held that he had not relinquished control over the cases, but had power to recall his judgments and to dismiss the applications, which, now that the law had

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been made clear by the House of Lords, he proceeded to do. It may be observed, tangentially, that if all the parties had been *sui juris* it would not have been necessary to consider an application to the court; the trusts could have been cancelled by agreement and the funds resettled.

Building Societies and the Forfeiture Clause in Leases

THE Building Societies Association, it is stated in the June issue of the *Law Society's Gazette*, has advised its member societies to consider every application for an advance on its merits before deciding to incur the risk involved in a mortgage of a lease containing a forfeiture clause in the event of the lessee's bankruptcy, or liquidation in the case of a company, or in the event of the lessee entering into a deed of arrangement with his creditors. The risk arises because the mortgagee, who may normally obtain relief in forfeiture proceedings taken by the lessor, will have no claim to relief in the event of the lessor obtaining possession without court proceedings. The risk may be remote, but, as the *Gazette* suggests, solicitors acting for intending lessees who hope to obtain building society mortgages should bear in mind the attitude of the building societies when deciding whether their clients would be justified in accepting leases containing such clauses.

Premiums on Sale of Long Leases

AN anomaly was created by s. 2 of the Landlord and Tenant (Rent Control) Act, 1949, in that many leases, particularly in the Pembroke Dock, Portsmouth and Sheffield areas, are subject to a rent which exceeds two-thirds of the rateable value. In such cases the tenancies fall within the Rent Restrictions Acts (s. 12 (7) of the 1920 Act), and it is illegal to take a premium on their grant, renewal or assignment. Thus such lessees have, since the Act of 1949 came into force, been unable to sell their leases. The Council of The Law Society, it is stated in the June issue of the *Law Society's Gazette*, have been in touch with the Ministry of Housing and Local Government and its predecessors about this matter since the early days of the 1949 Act, and have constantly pressed for amending legislation. Eventually the Council's proposed amendments were set down by several members as amendments to the Housing Repairs and Rents Bill, introduced in November, 1953, and a new clause has now been accepted by the House of Commons on the motion of the Minister of Housing and Local Government: "Subsection (2) of s. 2 of the Act of 1949 shall not prevent the requiring of a premium as a condition of the assignment of a tenancy granted for a term of years certain exceeding twenty-one years." The new clause is to become law one month after the Royal Assent is given to the Bill.

"EDITH"

THE Second Annual Report of the Estates Duties Investment Trust, Ltd., covers the first period of the company's operation, that for the year from April, 1953, to 31st March, 1954. The Trust aims "to provide a holder [of a private company's shares] of good standing and financial strength who will be neutral as regards the proprietary interests in the company and who is willing at the same time to be a minority holder." A statement by the chairman, LORD PIERCY, says that applications, principally through accountants, solicitors and banks, have numbered 135, of which twenty-two led to business being done, while thirty are still under consideration. Where business has not resulted, the directors believe that discussions have in many cases benefited the clients, and have sometimes enabled them to settle estate duty problems without selling shares to the Trust. Many applicants sought to provide for future death duties; others were concerned with meeting duties already assessed or in course of assessment. Discussing the proposals in the current Finance Bill for modification of s. 55 of the Act of 1940, Lord Piercy concludes that they mark a step towards recognising that there is in most cases a fair value for shares in private companies which can be freely ascertained.

The Briefing of Councils

"RESEARCH IN LOCAL GOVERNMENT" is hardly self-explanatory as the title of a lecture. An address delivered by Professor W. J. M. MACKENZIE of Manchester University to the annual provincial meeting of the Local Government Legal Society on 8th May was so named, and it appears that the word research is applied by the initiated in this connection to the getting out of the relevant facts for committees and inquiries, based on the best evidence available at the time, and the presentation of these facts in a skilled and attractive manner which is able to withstand cross-examination. The speaker thought that in general the great local authorities had the staff to do this, but wondered whether there was not some need for a consultative agency to help smaller authorities to present their cases. He glanced at the position in the United States, where there was a close association between the organs of local government and the research agencies. We gather that at a single centre, rather ominously referred to as "1313" from its street numbering, there is housed the Public Administration Clearing House and the Public Administration Service, in effect a business consultancy. A close connection is also to be noticed between the Clearing House and the Political Science department of Chicago University. At local level the pattern is repeated, through bureaux of municipal research and local universities. Whilst emphasising the difference in conditions, Professor Mackenzie posed the question whether some adaptation of this scheme might not be useful in Britain. He thought it might help the smaller local authorities to become less reliant on Whitehall, and that even the larger ones might benefit in staff training and the improvement of efficiency. The speaker touched probably his most controversial point when he suggested that an independent research agency might be better fitted than a royal commission to undertake the investigation to lead to the reform of local government which had been urged in some quarters.

Solicitors as Judges

THE status of the solicitors' branch of the legal profession has been reasserted and raised by the insertion in the City of London (Various Powers) Bill of a few words rendering solicitors of seven years' standing eligible equally with barristers of the like standing for appointment as a deputy to an assistant judge of the Mayor's and City of London Court or to any additional judge of that court. This achievement stands to the credit of the Council of The Law Society acting in conjunction with the Worshipful Company of Solicitors of the City of London, whose efforts are reported in the current issue of the *Law Society's Gazette*. In itself the advance is slight, but qualification as a deputy judge implies fitness to act as judge, and official recognition of this obvious inference is bound to come sooner or later.

MAINTENANCE OF A WIFE

WHEN Parliament, by the Married Women's Property Acts, 1870–1893, gave tardy recognition to a practice of protecting the separate property of married women from their rapacious husbands, it had already embarked on a growing stream of legislation to protect from destitution those who had no property. The Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1925, and their counterparts in the High Court were a development of the husband's common-law liability to maintain, which had proved inadequate to meet the changed position of married women. In this article it is proposed to consider their rights of maintenance at common law and the effect of statutory changes upon common-law rights and upon one another.

At common law, as a corollary of a wife's proprietary disability, there existed the fiction of her right to pledge her husband's credit for necessaries. Once her proprietary disability was removed, the retention of the fiction was no longer justified. This was the conclusion reached by the Court of Appeal in *Biberfeld* v. *Berens* [1952] 2 Q.B. 770, where it was held that a deserted wife who has adequate means of her own is not entitled to pledge her husband's credit for necessaries. The wife's brother, who had paid her £5 a week, was thus unable to recover this sum. Denning, L.J., considered that the husband could only be made to repay the loan in equity where the wife had exhausted her other remedies, i.e., by applying for maintenance from her husband in the magistrates' court or in the High Court, as she should not be able to get more from her husband by borrowing from her relatives than by going to the courts.

Denning, L.J., reached this conclusion by drawing a distinction between obtaining a loan for the purchase of necessaries, which is enforceable in equity only, and obtaining credit for the necessaries themselves, the cost of which can be recovered from the husband at common law. The latter right only is supplemented by a statutory remedy; to the former it is alternative. For it was held by the Court of Appeal in *Sandilands* v. *Carus* [1945] K.B. 270 that a deserted wife does not lose her right at common law to pledge her husband's credit for necessaries by obtaining a maintenance order against him from the justices.

The courts have, however, been reluctant to allow statute to give rights to a wife which she did not possess at common law. The wife's right to maintenance is dependent upon the non-commission by her of a matrimonial offence. If she is guilty of desertion she forfeits this right. In *National Assistance Board* v. *Wilkinson* [1952] 2 Q.B. 648 the Divisional Court rejected the argument that the National Assistance Act, 1948, had given the deserting wife a new right to be maintained by her husband.

The difficulties of obtaining credit for necessaries, especially by wives whose husbands possessed little or no property, made the common-law remedy inadequate, and the result was the growth of legislation enabling the wife to apply for maintenance in both the High Court and in the magistrates' courts. Both procedures developed independently, but the present tendency is towards assimilation, although some anomalies still exist (see article entitled "Maintenance: Problems Arising from Dual Jurisdiction," at 96 SOL. J. 505). Prior to 1949, the power to get maintenance in the High Court was by petition for restitution of conjugal rights. This was an expensive procedure and the wife had to say that she wanted her husband back, which in most cases she was most reluctant to do. She was often debarred from the magistrates' courts, for they were limited to persons of small income, as they could then usually only award £2 per week as a maximum. Section 5 of the Law Reform (Miscellaneous Provisions) Act, 1949 (now replaced by s. 23 of the Matrimonial Causes Act, 1950), gave her the right to maintenance in the High Court. This right differs from alimony on judicial separation under s. 20 (2) of the Act in that the court can order security, whereas in the case of alimony it cannot do so. In *King* v. *King* [1953] 3 W.L.R. 767; 97 SOL. J. 760 it was held that a wife who has already obtained a decree of judicial separation is not precluded from applying for maintenance under s. 23 (1) with the additional advantage which it confers of obtaining security. Section 23 has, however, some disadvantages compared with ss. 19 (1), 20 (1) and 22 (1) of the Act, in that the court has no inherent power to make an interim order for maintenance under r. 56 of the Matrimonial Causes Rules, 1950: *S.* (*D.A.*) v. *S.* (*J.D.*) [1954] 2 W.L.R. 1; *ante*, p. 13.

This right to apply to the High Court for maintenance was considered in relation to a maintenance agreement in *Tulip* v. *Tulip* [1951] P. 378. In June, 1932, a husband had covenanted to pay his wife a net yearly sum of £156. In December, 1949, when her position had deteriorated and that of her husband had improved since the agreement was made, she asked for the sum to be increased and, when this was refused, took out a summons in the High Court alleging wilful neglect to provide reasonable maintenance for her. The Court of Appeal held that the existence of the deed did not preclude the wife from applying to the court under s. 5 of the 1949 Act, as the court had jurisdiction to determine whether at the time of the application the husband was providing maintenance which was reasonable in the circumstances.

The effect of a maintenance agreement upon an allegation of wilful neglect to maintain had, prior to this date, been considered in the magistrates' courts, but not conclusively decided. In *Morton* v. *Morton* [1942] 1 All E.R. 273; 106 J.P. 139 it was held that such an agreement was not a bar to the jurisdiction of the court, but, having regard to the husband's regular payments thereunder and the history of the case, there was no evidence of wilful neglect to maintain. However, in *Dowell* v. *Dowell* [1952] 2 All E.R. 141, a wife covenanted not to sue as long as payments under a maintenance agreement were regularly made to her. Owing to ill-health she could not work and, on the husband's refusal to pay increased maintenance, she applied to the magistrates' court. It was held, applying *Tulip* v. *Tulip*, *supra*, that the punctual performance of obligations was not conclusive of the matter, and the wife was entitled to have the amount reviewed in the light of changed circumstances. Lord Merriman, P., said (at p. 143): "The jurisdiction is absolute, and cannot be bargained away, but it is a question for the discretion of the court in each case, taking all the circumstances into account, whether there has been wilful neglect to provide reasonable maintenance, in spite of punctual performance of the agreement." Not only does this case mark an extension of the principle of *Tulip* v. *Tulip*, *supra*, from the High Court to the magistrates' court, but it also extends it to the case of an undertaking not to sue. The principle of *Tulip* v. *Tulip* was reaffirmed in *National Assistance Board* v. *Prisk* (*The Times*, 30th January, 1954), and more recently still in *Goodinson* v. *Goodinson* [1954] 2 W.L.R. 1121; *ante*, p. 369, another case in which, as in *Dowell* v. *Dowell*, the wife had covenanted not to sue.

The courts have, conversely, considered the effect of obtaining a maintenance order upon a covenant to pay under a

separation agreement. In *Finch* v. *Finch* [1945] 1 All E.R. 580 it was held that such an order extinguished the covenant and the wife was prevented from claiming that it was extinction *pro tanto* only. This decision has, however, been adversely criticised and might not be upheld to-day.

In addition to agreements giving express rights to maintenance, the courts infer certain rights according to the circumstances of parting. Where a husband deserts his wife, he is clearly liable to maintain her; where the parting is consensual, he is not liable to maintain her in the absence of agreement, express or implied, to the contrary (*Baker* v. *Baker* (1949), 66 T.L.R. (Pt. I) 81; *Starkie* v. *Starkie* (*No. 2*) [1954] 1 W.L.R. 98; 98 *ante*, p. 46). It may be difficult to decide on the facts of any individual case into which category it falls. In *Stringer* v. *Stringer* [1952] P. 171; 116 J.P. 102, where a wife said to her husband that he had better go, and he was just as willing as she, it was held to be consensual separation. The fact that a wife is relieved that her husband has gone does not make it any the less desertion (*Kinnane* v. *Kinnane* [1953] 3 W.L.R. 782; 97 SOL. J. 764).

Thus the law of married women's maintenance has been extended to meet changed conditions since the time when it consisted solely of the wife's right to pledge her husband's credit for necessaries, but despite increased flexibility the basic rights and liabilities have altered but little.

R. M. H.

A Conveyancer's Diary

A WRONG WITHOUT A REMEDY

Two world wars and a social revolution have accustomed the private owner of property to seeing his rights subordinated to those of what is called the public, but it still comes as rather a shock when an owner suffers considerable damage to his house as a result of the activities of a local authority in the discharge of one of its principal functions and it is determined that he has no cause of action at law for the injury to his property. This is what happened in *Smeaton* v. *Ilford Corporation* [1954] 2 W.L.R. 668; *ante*, p. 251, and the result is the more surprising when it is seen that it flows, not from recent legislation of an emergency character (a source of frequent injustice to the property owner, but one which is made a little more tolerable by the hope that emergency and legislation will not endure for ever), but from what one may call the established law of the land. There was a possibility that the plaintiff in this action would appeal, but this, I understand, is now unlikely. Some discussion of the salient points of the case is therefore not untimely.

The plaintiff was the owner and occupier of a house fronting a road under which ran a soil and foul water sewer which served a large number of houses in the area and which was vested in the defendant corporation as sanitary authority. At times of heavy rain there were serious eruptions from the sewer through a manhole near the plaintiff's house, and the roadway became flooded with sewage which then ran by gravity into the plaintiff's house and garden. The defendant corporation did not dispute these floodings but pleaded that with the growth of their borough their sewage system had become inadequate. They had obtained an Act to empower them to build a new system, but had been unable to obtain the Minister's consent to the raising of the money required. But it was admitted that these circumstances would not and did not affect the question of the corporation's liability.

The plaintiff's case was that on these facts the corporation was liable either on the principle of *Rylands* v. *Fletcher*, or in nuisance. Negligence was not alleged.

The case based on nuisance was quickly disposed of. In circumstances such as these, it was held, a person is liable in nuisance to an adjoining or neighbouring occupier if he either causes the nuisance (e.g., by discharging sewage over the latter's land to his damage), or if he knows of an existing nuisance emanating from his own land and continues it by failing to take reasonable steps to prevent it. Further, in order to establish liability for continuing a nuisance by failing to prevent it, the person so failing must be shown to be in a position to take effective steps to that end. In the judgment of Upjohn, J., the plaintiff could not establish that the corporation had either caused or continued a nuisance within this definition of the particular wrong. Apart from some points which were entirely peculiar to the case, such as that the corporation had caused a nuisance because it had itself built houses which had been connected to the sewer in the plaintiff's road and so had actively contributed to the increase in the sewage therein (a point which went off on the pleadings), the reasons for this part of the decision were these. The corporation were bound to provide and maintain sewers as the sanitary authority for the area, but they did not thereby cause or adopt the nuisance. The nuisance was caused not by the sewers but by the overloading of the sewers; but that overloading arose, not from any act of the corporation, but because under s. 34 of the Public Health Act, 1936, they were bound to permit occupiers of premises to connect to the sewers and discharge their sewage therein. Nor had the corporation continued the nuisance, for they had no power to prevent the ingress of sewage into the sewers.

This part of the decision may perhaps be summarised by saying that there was no liability in nuisance established because the corporation had not been shown to have been guilty of a discharge, either actual or constructive, of sewage on to the plaintiff's land. But there had, admittedly, been an escape of sewage on to the plaintiff's land and on this escape the plaintiff founded the case which he put forward on the *Rylands* v. *Fletcher* principle. If this principle were applicable the corporation were liable for the escape from their sewer, for it was not suggested that they could avoid liability on the ground of *vis major*. The question on this part of the case was, therefore, this: did the principle, as a matter of law, apply to such an escape?

The principle was laid down in a well-known passage in the judgment of Blackburn, J., in *Fletcher* v. *Rylands* (1866), L.R. 1 Ex. 265, at p. 279, which was subsequently approved in the House of Lords ((1868), L.R. 3 H.L. 330): "We think that the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape . . . The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his

property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property."

This principle has been applied in a number of sewage effluent cases, beginning with *Hobart* v. *Southend-on-Sea Corporation* (1906), 75 L.J.K.B. 305, and ending with the decision of Harman, J., in *Pride of Derby and Derbyshire Angling Association* v. *British Celanese and Others* [1952] 1 T.L.R. 1013. But these were all cases where there had been an active discharge of foul matter by the defendant authority from a sewage disposal system, so that the plaintiff could in each have succeeded in nuisance without relying on the *Rylands* v. *Fletcher* principle of absolute liability for escaping matter, and this was the way that the Court of Appeal dealt with the *Pride of Derby* case when it came before it (see [1953] Ch. 149). On the other hand, there is a long line of cases, beginning with *Glossop* v. *Heston and Isleworth Local Board* (1879), 12 Ch. D. 102 (which will be found carefully analysed in the judgments in the *Pride of Derby* case), in some of which, at least, the complaint was founded on facts very similar to those in the *Hobart* and *Pride of Derby* cases and in which it was never suggested that the *Rylands* v. *Fletcher* principle applied to an escape from sewers vested in a local authority. In some of these cases it is possible to distinguish the cases in the *Hobart* to *Pride of Derby* line, but in others it is not.

In the present case, Upjohn, J., first dealt with some minor arguments put forward on behalf of the corporation's contention that the *Rylands* v. *Fletcher* principle was not applicable. He held, first, that it was not the true view to say that the corporation had not " collected " the sewage on to its own land before its escape, because they were under a duty to receive it; they did, in the learned judge's view, collect it, although they might be under a duty to do so, into a sewer vested in them. The learned judge then held that a local authority was not exempt from the principle on the ground that it collected the sewage for the benefit of the community and could not, therefore, be said to collect it (in the words of Blackburn, J.) for its own purposes. Sewage collection is beneficial to the community, but so is the provision of water, whether that is done by a local authority or not, and the question: " What is beneficial to the community? " cannot depend on the personality of the owner of the land who brings the substance on to it, but must depend entirely on the act. And next, the collection of sewage, inherently noxious and bound to do damage if it escaped, could not be described as a natural user of the land so as to displace the applicability of the *Rylands* v. *Fletcher* principle.

The most substantial argument put forward by the corporation was that a local authority carrying out statutory duties is not liable on this principle at all. This proposition, it was said (in the learned judge's view, rightly), was supported by the *Glossop* line of cases, in some of which the complaint was based solely on an escape and not on a discharge of foul matter and was thus factually indistinguishable from the plaintiff's case in the present case. In all these cases the plaintiffs' action had failed. But as there had been no discussion at all of the *Rylands* v. *Fletcher* principle in these cases, Upjohn, J., refused to hold that they concluded the action before him against the plaintiff.

The rock on which the plaintiff's case foundered was s. 31 of the Public Health Act, 1936, which provides that " a local authority shall so discharge its functions under the foregoing provisions of this Part of this Act [which include the provisions requiring a local sanitary authority to provide a sewage disposal system in its area] as not to create a nuisance." That section meant, in Upjohn, J.'s view, that if an authority did not create a nuisance in carrying out its duties, it was absolved from liability. On the true construction of its language, " nuisance " here excluded the principle of absolute liability for the escape of matter on which *Rylands* v. *Fletcher* had been decided, and the section, therefore, absolved the corporation from liability for the escape of sewage complained of.

This is the most important part of this decision. Upjohn, J., supported his construction of s. 31 of the Act by reference to several authorities, notably *Hammond* v. *Vestry of St. Pancras* (1874), L.R. 9 C.P. 316. There is not space to examine that case, but it has been suggested that the analogy between *Hammond's* case and the present case is not exact, in that in the former the plaintiff's case as pleaded was really that of a breach of statutory duty in not keeping sewers properly cleaned. It may be felt in some quarters that it is a very strong thing to absolve a party from the consequence of a particular tort by implication from a prohibition against the commission of another tort. But the authorities on this kind of case are undoubtedly in a state of some confusion, and it is probably impossible for any court below the highest to reach a decision on them which will be wholly immune from the criticism that the earlier cases relied upon to support it do not really do so.

However that may be, there are two quite general comments which can be made on this decision. First, it does not affect what are usually referred to as pollution cases, that is to say, cases where the act of the defendant relied upon is a positive act of discharge, and not a passive state in the presence of an escape. Secondly, if this decision stands, great hardship will be suffered by landowners in a similar position to that of the plaintiff. Local authorities in the position of the defendant corporation are also, it may be said, in a difficult position, but in the last resort they are responsible for the sewers in their area, and the private owner of property is not. If this decision stands, some legislative interference with the law may be necessary.

" A B C "

OBITUARY

MR. R. W. ELLETT

Mr. Robert William Ellett, retired solicitor, of Cirencester, died on 27th May, aged 81. He was clerk to the Cirencester Magistrates for more than forty years and was clerk to Cirencester Urban Council for twenty-two years. He was afterwards solicitor to the Council. He was a past-president of the Gloucestershire and Wiltshire Law Society and was admitted in 1896.

MR. G. H. ESPLEY

Mr. George Herbert Espley, solicitor, of Wellington, Salop, died on 1st June, aged 74. He was admitted in 1901 and was clerk to the Wellington Burial Board for many years.

MR. P. M. PRANCE

Mr. Patrick Montgomery Prance, solicitor, of Plymouth, died on 20th May, aged 59. He was admitted in 1920.

MR. H. L. THACKWRAY

Mr. Harold Lackabane Thackwray, retired solicitor, of Huddersfield, died recently, aged 68. He was admitted in 1925.

MR. H. W. THORNTON-JONES

Mr. Henry William Thornton-Jones, solicitor, of Bangor, died on 31st May, aged 59. He was admitted in 1919.

Landlord and Tenant Notebook

DEROGATION BY AGREEMENT WITH THIRD PARTY

WHEN writing in our issue of 23rd May, 1953 (97 SOL. J. 366), about *Perera* v. *Vandiyar* [1953] 1 W.L.R. 672; 97 SOL. J. 332 (C.A.), in which a tenant sued a landlord who had cut off the supply of gas and that of electricity from the demised premises, I respectfully suggested that better results might have been achieved if the cause of action had been derogation from grant rather than breach of contract or eviction. The possibilities of such an action are, I believe, apt to be overlooked; but something has been heard of them twice since. Thus, one of the issues in *Mason* v. *Clarke* [1954] 2 W.L.R. 48; *ante*, p. 28 (C.A.), was whether a landlord who had reserved ground game (subject to the Ground Game Act, 1880) could legitimately complain when the tenant entered into an agreement with the county agricultural executive committee by which they were to destroy rabbits by gas. The contention was that this was a derogation from (re)grant; and while, having regard to the fact that compulsory notices had been served, the "agreement" bore those characteristics which the late Herr Hitler was wont to attribute to the Treaty of Versailles, the decision was that the tenant had, according to the authorities, done only what was reasonable and advisable in the case of such reservations (see *ante*, p. 72).

The other decision is *Marco* v. *Valente* [1953] C.P.L. 490; [1954] 3 C.L. 473 (C.A.); and it is the short statement in "Notes of Cases" in *Current Law* for March of this year which is of importance for present purposes because, while the appeal was dismissed by reference to the doctrine, derogation from grant does not appear to have been mentioned at first instance. An agreement with an authority was again the occasion of the trouble: this time it was a landlord, plaintiff in an action for possession, who had made an agreement with the local (highway) authority by which he undertook to demolish premises within two months after three months' notice had been given by either side (the demolition was to facilitate road widening). He had then let those premises to the defendant, and an earlier action for possession brought in 1950 had been amicably settled on terms which included an undertaking that the plaintiff would not terminate the defendant's tenancy until he "became under an obligation to demolish the premises." In December, 1952, the plaintiff himself gave a notice under the agreement with the authority and, having given the defendant notice to quit, sued for possession on the ground of the resultant obligation. Lloyd-Jacob, J., held that that notice to quit was given in breach of implied obligation, dismissed the action and awarded damages on a counter-claim; the Court of Appeal held that it was given in derogation of grant and upheld the dismissal.

The interesting feature of the decision on appeal is that the obligation not to derogate from one's grant has been treated as a condition. The defendant was not told that the notice to quit was valid but that he had a claim for damages; breach of the obligation was held to make the notice a nullity.

A tenant relying on an agreement not to give notice to quit has always been in a difficult position, the agreement being repugnant to the habendum; in *Cheshire Lines Committee* v. *Lewis & Co.* (1880), 50 L.J.Q.B. 121 (C.A.), the landlords had stated in writing, when letting a house by the week, that the tenant could have it until they wanted to pull it down and it was held that the document gave him no defence when they determined the tenancy without wanting to demolish the house. That case could, of course, be distinguished, in *Marco* v. *Valente*, by reference to the terms of the 1950 compromise of proceedings; and the same could be said of *Doe d. Warner* v. *Browne* (1807), 8 East 165, in which there was a provision by which the landlord would not disturb the tenant as long as he paid rent: this was held to be repugnant to a yearly tenancy.

That a tenant can acquire such security has, however, been demonstrated in *Re King's Leasehold Estates* (1873), L.R. 16 Eq. 521, and, again, in the somewhat remarkable *Zimbler* v. *Abrahams* [1903] 1 K.B. 577 (C.A.). In both these cases, however, it is clear that what was decided was that the habendum of the term granted or agreed to be granted was not to be deduced from the reddendum or anything else; that the landlord had meant to grant, and the tenant to accept, a tenancy for the term of the former's lease (he being a tenant) in the one case, for the life of the latter in the other, subject to rent being duly paid; so that there was no inconsistency, no repugnance to the nature of the tenancy, in the restriction on the landlord's right to give an effective notice to quit. While we are not told what was actually the term of the tenancy in *Marco* v. *Valente*, one would have expected the defence to allege that a tenancy for the life of the tenant had been created, subject to a condition that the landlord might determine it by notice if he incurred the obligation described, rather than a contention that the notice itself infringed a condition of the tenancy.

And a perusal of the authorities illustrating the doctrine of derogation from grant does not reveal any decision in which it was held to extend to an act which would terminate the tenancy, not merely interfere with the use and enjoyment of the land demised; or one in which breach was held to afford a defence to a claim for possession.

There is, of course, no limit to the variety of circumstances which can amount to derogation from grant; perhaps the most useful statement of the principle underlying the doctrine was that given by Bowen, L.J., in *Birmingham, Dudley and District Banking Co.* v. *Ross* (1888), 38 Ch. D., at p. 313 (C.A.); a grantor having given a thing with one hand is not to take away the means of enjoying it with the other. It was not, apparently, suggested in *Marco* v. *Valente* that the plaintiff had not "become under an obligation to demolish the premises"; the point taken was that so becoming was his own doing and, thus, the breach of an implied condition or a breach of his obligation not to derogate. And, while no one would criticise the finding that he had infringed an obligation undertaken towards his tenant, characterising that obligation as an obligation not to derogate from grant strikes one as novel.

The entering into an agreement with a third party can amount to a derogation; in *Marco* v. *Valente* it was not the making of the agreement but its performance that was complained of. In such cases the aggrieved tenant may have remedies against the landlord and the third party; in the above-mentioned case of *Birmingham, Dudley and District Banking Co.* v. *Ross* it was, in fact, the third party, tenant of the same landlords (the corporation of Birmingham), who was sued for interfering with light, the obligation being held to bind him and the corporation being, presumably, *tertius gaudens*. Reported decisions in which tenants have complained of tenancies granted to third parties mostly record failures, but the failure has been due to there being no actionable interference with enjoyment or use (e.g., *O'Cedar, Ltd.* v. *Slough Trading Co.* [1927] 2 K.B. 123—

plaintiff's insurance premiums increased; *Port* v. *Griffith* [1938] 1 All E.R. 295—letting to competitor in business); but *Newman* v. *Real Estate Debenture Corporation, Ltd. and Flower Decorations, Ltd.* [1940] 1 All E.R. 131, while the decision was also based on breach of building scheme, does give us modern authority for the proposition that letting adjoining premises for a purpose which, when carried out, will make the plaintiff's premises less fit for the purpose for which *they* were let, is a derogation from grant (the complaint was that part of a building let in flats had been let to a commercial undertaking). The decision is, incidentally, useful as illustrating circumstances in which derogation from grant can be invoked when breach of covenant for quiet enjoyment will fail.

R. B.

HERE AND THERE

"IF TIME PERMITS"

ONE of the best things that F. E. Smith ever said in the House of Commons was in puncturing a Ministerial reply to a challenge on some election promise, that the Government regarded it as an obligation of honour to bring in a certain measure "if time permits." This, rejoined Smith, suggested the existence of three classes of men "honourable men, dishonourable men and honourable men if time permits." In that single phrase he unseamed from the nave to the chaps the whole fallacy that honour or a promise explicitly given has automatic escape hatches provided in case of inconvenience or second thoughts, whereas it is the very function and *raison d'être* of a promise that when the time comes for fulfilment you will keep your word no matter how little you may feel inclined to. Circumstances may alter cases, but, short of stark impossibility, they do not alter promises. It is in his ability to give his word and keep it that the human creature differs most decisively from all other creatures. Those other creatures do just what they feel like doing at any given moment. Leviathan—will he make a covenant with thee? And leviathan may well be very happy in his own way but he is not us and his ways are not ours, and the whole of every conceivable social order from boarding a bus to building a battleship, from hiring a horse to sending your son to school, rests on the faith of a whole network of promises.

THE PROMISE

AND if that simple but startling fact underlies our relations with our butcher, our baker and our tailor, it is even more startlingly relevant to the relationship between men and women without which the butcher, the baker and the tailor would never have come into this world at all. The relations between the sexes have been called a war older than the class war. They have been called blackmail and exploitation and a great many other things besides. But by reason of the very tensions inherent in those relations it is necessary to find a reconciliation. By reason of its diversities it is necessary to find a common denominator. Hence the most tremendous of all promises, the marriage vow with all its implications. And this too has been affected by the fashion for regarding promises as shifting and unilaterally variable, so that if you meet a more attractive woman or one who is a better financial proposition you are yet free to change—an honourable man so long as your essential sentiments permit. On the whole, however, this view is not shared by the judiciary. It was therefore surprising to encounter recently a *dictum*, uttered in the Court of Appeal, which by its implications would cut at the very root of the marriage vow. A man marrying a wife of a different religion to his own had undertaken that the children should be brought up in her religion. The marriage had been dissolved and a dispute arose upon the fulfilment of the promise. In the course of the hearing, Denning, L.J., observed that the only thing alleged against the father was that he was not sincere in giving and keeping the undertaking. "How can you expect a man to be sincere if he is forced into it?" he asked. "He is told 'You cannot marry unless you give an undertaking'." Well, if that goes for one of the promises a man makes in marriage it goes for all. No man in the transfigured hours of love is calculating with the coolness of an attorney or a cheesemonger. He knows that if he does not make the vow with all its implications he will lose the woman and those implications are roots which stretch to every part of his life. The promise of marriage in different nations, tribes and religions assumes innumerable variations in the obligations expressed but, whatever form the promise assumes, is it really proper to encourage a man to chip off lumps of his undertaking on the ground that he wasn't quite himself, that he did want the woman so much, that in holding out for his promise she was exerting duress or undue influence, that now he's come to his senses honour is, if not satisfied, at least absolved?

WALTER STEWART

ONE of the saddest things about the legal profession is that while it produces innumerable vivid and original characters, it is often the less vivid and the less original who attain that professional eminence which at any rate gets them into the Dictionary of National Biography. There is a strong element of the accidental in the fact that an F. E. Smith or a Tim Healy happens to take a road that makes him not only "memorable" but actually remembered in other generations than his own. Or perhaps a man may enshrine his personality in a book like MacKinnon, L.J., or the late Reginald Hine, or he may inspire a book in somebody else. Before it is too late someone ought to write a memoir of Walter Stewart who died on the 28th May at the age of eighty-eight. Though few will remember him as an active practitioner before the first world war, many must still recall his small wiry figure and unconventional personality during the 'twenties and 'thirties when he was still well known in the Temple. When he was called to the Bar in 1896 he already had a richly varied assortment of experiences behind him. Originally he had intended to join the Navy but after a period in the *Worcester* it was discovered that he was colour blind and therefore ineligible. This, however, did not abate his love of sailing. He subsequently voyaged to Australia in a windjammer, the *Star of Russia*, he became a remarkably talented and original naval architect and all his life his great devotion was to small boats; but this did not exhaust his unbounded energies. Skating, riding, ballooning when that was a pioneer sport, bicycling—he excelled in all. Once, having made a horseback dash from some country house to the railway to reach a county court in time, he appeared in breeches and the judge adjourned the case while he went out to buy a pair of appropriate trousers. He was known to cycle back all the way from the Norwich Assizes to the Temple, arriving in the middle of the night. He built a dinghy in his professional chambers in Crown Office Row and launched it at the Temple Stairs. His mellifluous voice and great personal charm made him a deadly opponent in any jury case. He was not so good at pure law and he used to tell how once when by accident

he found himself in the Chancery Division the judge kindly and charmingly intervened to protest: "Mr. Stewart, you are addressing me as the commonest of common juries." With his charm went a singular power of sarcasm which while it was admirable for puncturing pomposity made him many enemies. At one stage of his career he could have been a county court judge, but he said he would sooner be dead. Gradually he turned away from the law and concentrated more and more on sailing. When the Temple chambers which were his home were bombed he took to living entirely on his boat, moored at Heybridge Basin in Essex. He was one of the great characters of his generation. God be with him.

RICHARD ROE.

BOOKS RECEIVED

Williams' Law and Practice in Bankruptcy. Supplement to the Sixteenth Edition. By MUIR HUNTER, B.A., of Gray's Inn and the Western Circuit, Barrister-at-Law, Junior Counsel to the Board of Trade in Bankruptcy Cases. 1954. pp. xix and 245. London: Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. £1 10s. net.

Stone's Justices' Manual, 1954. Eighty-sixth Edition. Volumes 1 and 2. Edited by JAMES WHITESIDE, Solicitor, Clerk to the Justices for the City and County of the City of Exeter, and J. P. WILSON, Solicitor, Clerk to the Justices for the County Borough of Sunderland. 1954. pp. (vol. 1) cccxxviii and 1304, and (vol. 2) vii, 1307 to 2959 and (Index) 220. London: Butterworth & Co. (Publishers), Ltd.; Shaw & Sons, Ltd. Thin Edition, £4 2s. 6d. net. Thick Edition, £3 17s. 6d. net.

Archbold's Criminal Pleading, Evidence and Practice. Thirty-third Edition. Second Cumulative Supplement, 1st May, 1954. Edited by T. R. FITZWALTER BUTLER, Barrister-at-Law, and MARSTON GARSIA, Barrister-at-Law. 1954. pp. 22 and (noter-up) 12. London: Sweet & Maxwell, Ltd.

According to the Evidence. By HENRY CECIL. 1954. pp. 224. London: Chapman & Hall, Ltd. 10s. 6d. net.

REVIEWS

The Law and Practice of Divorce and Matrimonial Causes, including proceedings in Magistrates' Courts. Third Edition. By D. TOLSTOY, of Gray's Inn and the South-Eastern Circuit, Barrister-at-Law. 1954. London: Sweet & Maxwell, Ltd. £2 2s. net.

As a factual but well-referenced statement of the law of matrimonial litigation, half-way in size between a mere student's outline and the larger books, Mr. Tolstoy's work has made a place for itself on practitioners' bookshelves from which it will not easily be dislodged. The text is well built up, proposition by proposition, from statute and case law in a form rendered the more acceptable by economy of expression and the general absence of theoretical discussion. And after the subject has been set out in this fashion, the modern statutes and rules are printed so that the navigator in these troubled waters may have his sheet anchor handy in case of need.

There really is not much more to say about this very useful book, except that the third edition fully maintains the standard of clarity and comprehensiveness set by its predecessors and that the citation of cases is admirably complete and up to date.

The Law in Action. A Series of Broadcast Talks. With a Foreword by the Right Honourable LORD ASQUITH OF BISHOPSTONE. 1954. London: Stevens & Sons, Ltd. 7s. 6d. net.

When the lawyer addresses the layman, he is usually concerned to achieve one of two things. Either, as in the case of a solicitor advising a client, to put a particular situation which has in fact arisen or is about to arise into its proper legal setting as regards the client's position and the possibilities open to him; or, as with several admirable little publications and some which are not so praiseworthy, to generalise an outline of a legal subject in terms which the ordinary reader can understand. It is comparatively rare for a non-lawyer to be allowed in on a discussion of genuine legal "shop," and when he is so privileged one may doubt whether he appreciates the honour.

Yet the six talks here reprinted have aroused interest in lay circles, and the subject-matter is in each case one which recent developments have fashioned into a current topic among legal professionals and academicians alike, a speculative and controversial talking point for the legal world. That the speakers have been able, by skilful and restrained presentation, to interest the Third Programme audience at large, while at the same time preserving the authentic atmosphere and language in which discussions are carried on among the initiated, is the highest possible tribute to the nice poise of their views.

The practitioner who missed the broadcasts will gain much from the enlightened discussion of such recent leading cases as *King* v. *Phillips*, *Jones* v. *Manchester Corporation*, *Bendall* v. *McWhirter* and *Rimmer* v. *Rimmer* and their sequels, and the trade union expulsion cases and the "Pottery" case. These are treated informatively and with some intelligent speculation as to their consequences by Professor Goodhart, Professor Hamson, Mr. Megarry, Mr. T. C. Thomas and Professor Glanville Williams respectively. Mr. H. W. R. Wade brings up the rear with a brief study of the individual's rights in modern administrative law. Listeners to the broadcasts will be glad to have the text in permanent form, with references to reports, and a little revision to deal with even more recent decisions.

The Stock Exchange Official Year-Book, 1954. Volume I. Editor-in-Chief: Sir HEWITT SKINNER, Bt. London: Thomas Skinner & Co. (Publishers), Ltd. Two volumes, £7 net.

A notable addition to Volume I of this year's Stock Exchange Official Year-Book is the inclusion of summarised balance sheets for all British and the majority of other companies. This is instead of the usual brief selection of items from balance sheets. Other new features of this edition are a list of overseas Stock Exchanges in the British Commonwealth, details of the Japanese debt settlement and the London Agreement on the German debt. At the beginning of the Iron, Coal and Steel section a summary of the provisions of the Iron and Steel Act, 1953, has been made. Volume II, which is to be published in September, will contain the section on Mines and the Commercial and Industrial section.

TALKING "SHOP"

TUESDAY, 1ST *June*, 1954

Why are building leases usually granted for ninety-nine years? This question was asked recently on a popular wireless programme and was answered—I think more or less correctly—by the statement that a longer lease would cost more in stamp-duty. I was sorry that there were no "supplementaries." Why does it cost more? And why, for that matter, does a lease for a term exceeding thirty-five years cost more than a lease for a shorter term?

At the back of all this may lie the theory that long leases cause loss to the Exchequer; the freehold is, as it were, put into baulk, and something must be done to make up for all the lost stamp-duty on conveyances that might have been granted during the demise. In practice, of course, a building lease is usually the *fons et origo* of underleases, assignments, mortgages, transfers of mortgage, surrenders and licences galore, and of these all but a few—such as licences under hand to assign or sub-let—bear *ad valorem* stamp-duty. *Qui*

terre a, guerre a ; by and large, the more proprietary interests, the more numerous will be the documents required for the mutual adjustment of them.

Seeing that we are for ever being urged to higher productivity, it does not seem fitting that we should be discouraged in the task by a penal tax upon fertile documents: as well grind the seed-corn for bread. The rate of duty on leases goes up by leaps and bounds: except in the lowest brackets, 2 per cent. for a term not exceeding thirty-five years, 12 per cent. for a term between thirty-five and 100 years, and 24 per cent. for a term of 100 years or more. No wonder the process stops there. If the rate were doubled for every succeeding 100 years of the term, a 999 years' lease would cost 6,144 per cent. of the rent in stamp-duty, or about three thousand times the rate for a conveyance of the freehold. (Perhaps it would be a fairer reflection of the system to step up the duty at progressively longer intervals in the sequence 0 : 35 : 100, etc., but this, I fear, is beyond my arithmetic; the resulting percentage figure would be less, but it would still be high.)

Wednesday, 2nd

In most, though not in all, respects there is little to choose between an agreement for lease and a lease; this, of course, is student's law—see *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9—and it is doubtless for this reason that s. 75 of the Stamp Act, 1891, requires *certain* agreements for leases to be stamped as though they were leases. Both the principle and the practice are so familiar that one may all too readily, but mistakenly, assume that the section applies to *all* agreements for leases. In fact it applies to an agreement for lease for an indefinite term or for a term of not more than thirty-five years.

"Indefinite term" is perhaps a loose way of describing a periodic tenancy, but if the agreement is for a lease for an indefinite term in the strict sense, probably the best thing to do is to tear it up and start again: see *Lace* v. *Chantler* [1944] K.B. 368; readers who recall the war-time validation of such leases by the Legislature will hardly need this reminder.

As to definite terms, why should it be permissible to postpone the *ad valorem* 12 per cent. and 24 per cent. stamp-duty until the granting of the formal lease, but not the 2 per cent. duty? Perhaps because agreements for the longer terms seldom fail to mature into formal leases.

Finally, the "Particulars Delivered" stamp. For twenty-three years the little buff forms have been pouring into stamp offices and what useful purpose they serve is known, one hopes, to the clerks who daily file them deeper or pile them higher. Here again is an anomaly. Under a penalty of £10 it is the duty of the lessee to "produce to the Commissioners the instrument by means of which . . . the lease [was] granted *or agreed to be granted*" (s. 28, Finance Act, 1931); and this section applies (*inter alia*) to "the grant of any lease of land for a term of seven or more years." But by subs. (2) production of the agreement for lease is enough; there is no need to produce the lease as well, unless the lessee wishes to have it denoted.

So it seems that agreements for lease in the seven to thirty-five years class must bear the *ad valorem* duty *and* the P.D. stamp; those in the "over thirty-five years" class normally escape the *ad valorem* duty, but must bear the P.D. stamp; and the lease itself ("over thirty-five years" category) takes the *ad valorem* duty (and a denoting stamp, if desired), but no P.D. stamp.

But enough of stamp-duty.

Week-End Reflections

I must be very careful what I write about trust corporations for I would not wish to offend my friends in trustee departments who have helped me over so many stiles. The great mistake in the conventional (and let us hope now moribund) controversy is to suppose that corporate and individual trustees are always interchangeable like different makes of sparking plug on the trust machine. Some machines run better on petrol and some on Diesel oil; the really important thing is to choose the right fuel.

None the less, there are some quotations from the classics that needlessly grate upon one's fleeting recollections of the law. In a certain trust corporation's booklet I find under the heading "Existing Trusts" the singular quotation "But if she will not be ruled, I shall fling up my executorship," and this is attributed to Samuel Pepys' Diary, 1661. The date I take for an immaterial error; here at all events is the entry for 15th September, 1660 (Lord's Day):—

> "So we went to church with the corps, and there had service read at the grave, and back again with Pegg Kite, who will be, I doubt, a troublesome carrion to us executors, *but if she will not be ruled, I shall fling up my executorship.*"

Then, to revert to the booklet, after this quotation (italicised portion), it offers the reminder that "as trustee of an existing trust, you may find the duties altogether too onerous and wish to be relieved of them." (Too true!) "Perhaps . . . like Mr. Pepys, you are experiencing a conflict of family interests . . . Why not then consider the appointment of . . . ?" Well, why not indeed? And I like "experiencing" with its gentle hint that few of us have ever met with such a remarkable state of affairs as family squabbles before.

It is to be hoped that your client will focus upon the heading "Existing Trusts" (which, to be fair, clearly refers to trustees and not executors) lest he be led to suppose that executorships and trusteeships are much of a muchness. Should he be thinking of "flinging up" his executorship, pray let him emulate the astute Mr. Pepys and think of it betimes at the graveside or soon after; then he may renounce probate or as a half-measure reserve power to prove. For "the office of executor being a private one of trust and, as a rule, named by the testator, not by the law, the person nominated may refuse, though he cannot assign the office" (Williams on Executors, 12th ed., vol. 1, p. 168); and if he intermeddles he can be compelled to prove (*ibid.*, p. 175). And once he has proved—of this I have many times been assured by learned counsel—there is no means known to the law, short of the revocation of his grant and the issue of a new grant, whereby he may voluntarily resign his office before his duties as executor have been fully discharged.

A cursory reading of s. 39 of the Trustee Act, 1925, and of the definition of "trust" and "trustee" in s. 68 might well suggest a contrary conclusion. But by subs. (4) of s. 41 (power of court to appoint new trustees) "nothing in this subsection gives power to appoint an executor or administrator"; *non constat* that an executor should be able to do under other sections what the court cannot do under s. 41, or so runs the argument. Moreover, by s. 15 of the Administration of Estates Act, 1925, "when administration has been granted in respect of any real or personal estate of a deceased person, no person shall . . . act as executor . . . until the grant has been recalled or revoked." And see also the strong statement in Lewin on Trusts, 15th ed., at p. 415.

In brief, an executor who puts his hand to the plough must not look back. Short of such extreme measures as self-induced lunacy and standing mute of malice, the choice as a rule lies between finishing the administration or retreating overseas under cover of a so-called "trust" power of

attorney; s. 25 of the Trustee Act, 1925, can, of course, be invoked by trustees and by personal representatives alike. But when the beneficiaries prove to be "troublesome carrion" the bidding for office of executor's attorney is seldom brisk. Thus, "getting out" even in the geographical sense compares indifferently with the customary solution of this problem, namely, "getting on."

Let it not be said, however, that I have no constructive contribution to make to the advertising programme of trust corporations. "Let's choose executors and talk of wills"—Shakespeare's gift to them from Richard II—has its merits, but it has become wearisome with repetition. A glance at the names of the parties in long lists of post-war will-construction cases suggests a clue. Why not advertise this activity, so beneficial to our profession? And to what better source can we look than the self-same Diary of Samuel Pepys? Little need be changed except the title and that I offer free, gratis and of acknowledged malice aforethought. It is "Deep in Chancery with Tom Trice."

"ESCROW"

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Incorporated Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note.

COURT OF APPEAL

RATES AND RATING: APPEAL TO LANDS TRIBUNAL: JURISDICTION TO DEAL WITH QUESTION NOT UNDER APPEAL

Ellerby *v.* March (Valuation Officer)

Somervell, Birkett and Romer, L.JJ.

10th May, 1954

Case stated by Lands Tribunal.

The Local Government Act, 1948, provides by s. 48: "(3) On the hearing of an appeal to a local valuation court (*a*) the appellant; and (*b*) the valuation officer, when he is the appellant; and (*c*) the owner or occupier of the hereditament to which the appeal relates, when he is not the appellant; and (*d*) the rating authority . . . when . . . not . . . the appellant . . . shall be entitled to appeal and be heard as parties to the appeal and to examine any witness before the court and to call witnesses. (4) After hearing the persons mentioned in the last preceding subsection, or such of them as desire to be heard, the local valuation court shall give such directions with respect to the manner in which the hereditament in question is to be treated in the valuation list as appear to them to be necessary to give effect to the contention of the appellant if and so far as that contention appears to the court to be well founded, and the valuation officer shall incorporate in the list as settled, or, as the case may be, cause to be made in the list, such alterations as are necessary to give effect to those directions." By s. 49, as modified by the Lands Tribunal Act, 1949: "(1) Any person who, in pursuance of the last preceding section, appeared before a local valuation court on the hearing of an appeal and is aggrieved by the decision of the court thereon may, within twenty-one days from the date of the decision, appeal to [the Lands Tribunal] . . . and the [tribunal] after hearing such of the persons as appeared as aforesaid as desire to be heard, may give any directions which the local valuation court might have given." The occupier of a hereditament entered an objection to a proposal of the valuation officer for the alteration of the valuation list in respect of the property. Notice of appeal to the local valuation court was given by the valuation officer. The local valuation court heard and determined the appeal and directed that the valuation list be altered by substitution of the description contained in the proposal for the previous description, and that the gross and rateable value of the property be raised to figures above those previously appearing in the valuation list, but below those contained in the proposal. The ratepayer gave notice of appeal to the Lands Tribunal. The valuation officer gave notice of intention to appear at the hearing of the appeal. Before the tribunal the valuation officer raised the point that, although there was no appeal or cross-appeal by him, the tribunal had jurisdiction, by virtue of s. 49 (1) of the Act, to increase the assessment made by the local valuation court up to the figures contained in the proposal. The tribunal rejected this contention and affirmed the decision of the local valuation court. The valuation officer appealed.

SOMERVELL, L.J., said that the question could be made clear by considering ss. 48 and 49 of the Act of 1948. In the present case, the local valuation court could have done anything from directing that the figures were to remain as they were up to confirming the alteration proposed by the valuation officer; and it was submitted that the final words of s. 49 (1) conferred a statutory jurisdiction on the appellate tribunal, unrestricted by any procedural condition precedent, to hear and determine all the issues which had been or could be raised before the local valuation court, notwithstanding the limited ambit of the appeal. But the limitation in s. 48 (4): "such directions . . . as appear to them to be necessary to give effect to the contention of the appellant" ought to be read into s. 49 (1). That was the natural meaning of the language; but if there was any ambiguity, it should be resolved by consideration of the general principle that courts and tribunals deal with matters which the parties bring before them, and only exceptionally deal with matters which the parties do not bring before them. It would have needed very clear words to express an intention that an appellate court should deal with matters other than those which an appellant brought before it. If the position was otherwise, great inconveniences might occur; for instance, on an appeal by the valuation officer, the ratepayer, without serving notice of appeal, might bring up the question that the premises ought to be de-rated. The appeal should be dismissed.

BIRKETT and ROMER, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *M. Lyell*, Q.C. (*Solicitor of Inland Revenue*); *M. Rowe*, Q.C., and *F. A. Amies* (*Kinch & Richardson*, for *T. G. Baynes & Sons*, Dartford).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [3 W.L.R. 53

PRACTICE: USE OF JUDGE'S NOTE ON APPEAL: SEPARATE INTERVIEW OF PARTIES BY JUDGE

Stevens *v.* Stevens

Evershed, M.R., Jenkins and Hodson, L.JJ. 14th May, 1954

Appeal from Judge Rewcastle, sitting as Special Commissioner.

The petitioner, Sylvia Stevens, sought a divorce on the ground of the cruelty of her husband, Ronald Stevens. The commissioner who tried the action, after hearing the wife's evidence, saw counsel in his private room and, with a view to effecting a reconciliation between the parties, subsequently saw the wife alone twice and the husband once, with their counsel's consent. The efforts at reconciliation failed and after a three-day hearing the commissioner dismissed the wife's petition. On the wife's appeal a transcript of all the evidence was made. With the parties' consent and in order to save time and to prevent the appeal standing over for a substantial period part heard, the members of the Court of Appeal read the transcript of the evidence themselves in private.

EVERSHED, M.R., referred to Ord. 66A, emphasising the importance of r. 3, which provides that where a judge so intimates, his note may be used in an appeal instead of a transcript of the evidence, and that even if a transcript is made, any part which in the opinion of the judge or by agreement between the parties would not assist the Court of Appeal should not be transcribed. The court had read the transcript privately because of the special circumstances, but it would not be right as a common practice for the court to adjourn and read the transcript of the evidence for itself. If that were done, it might be thought that having read the evidence and conferred privately together, the court had reached conclusions which it would be difficult to change, so that the decision would be come to, not on argument addressed in open court but on what had happened behind closed doors. The evidence in this case showed that the wife's petition was rightly dismissed, but it was undesirable that the judge should have interviewed the parties separately and individually. Except

in cases relating to infants and custody if the judge desired to see the parties apart from their legal advisers, he should see them together, as there should not be communications passing between the judge and one party of which the other party knows nothing.

JENKINS and HODSON, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *J. L. Elson Rees* (*Adrian de Fleury, Gassman and Co.*); *John Perrett* (*Hunters*).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] [1 W.L.R. 900

FARM WORKER'S COTTAGE LET SEPARATELY FROM FARM: WHETHER AGRICULTURAL HOLDING

Blackmore *v.* Butler

Somervell, Birkett and Romer, L.JJ. 19th May, 1954

Appeal from Basingstoke County Court.

The Agricultural Holdings Act, 1948, provides by s. 1: "(1) In this Act the expression 'agricultural holding' means the aggregate of the agricultural land comprised in a contract of tenancy, not being a contract under which the said land is let to the tenant during his continuance in any . . . employment under the landlord. (2) . . . the expression 'agricultural land' means land used for agriculture which is so used for the purposes of a trade or business . . ." When negotiating for a lease of a farm the defendant made it clear to the lessor that he also wanted a tenancy of an adjacent cottage for occupation of one of his farm labourers. The cottage was then occupied by a farm labourer, *G*, who was employed on a neighbouring farm, and the landlord was reluctant to evict him until alternative accommodation was available. When such accommodation had been found, and *G* had left, the defendant took over the tenancy and paid the rent, the cottage being occupied by his farm labourer. The evidence showed that the cottage had always been used to house a farm labourer. The plaintiff, having purchased the cottage at an auction, with full knowledge of the defendant's tenancy, served on him a notice to quit and brought proceedings in the county court for possession. The defendant served on the plaintiff a counter-notice under s. 24 (1) of the Agricultural Holdings Act, 1948, claiming (1) that the cottage, together with the farm land, was an agricultural holding within s. 1 (1) of the Act, or (2) that the cottage was itself an agricultural holding within the meaning of s. 1 (2). The county court judge held that the cottage with its garden was land used for agriculture within the meaning of s. 1 (2) and dismissed the claim for possession. The landlord appealed. *Cur. adv. vult.*

SOMERVELL, L.J., said that the landlord contended, first, that an agricultural holding must be the subject of a single contract of tenancy under s. 1 (1); however connected a second tenancy might be to a tenancy of agricultural land, it could not with the latter tenancy constitute an agricultural holding. Secondly, he contended that an agricultural worker's cottage was not "used for agriculture" within subs. (2); it was simply a dwelling-house used as such. There were similar issues in *Godfrey* v. *Waite* (unreported; 6th June, 1951). There agricultural land and a residence were let at different times by the same landlord to the same tenant. The county court judge found that there was no intention to let the house as a farmhouse for the land, so that the house was not an agricultural holding, and the Court of Appeal so held; if it had been let as the farmhouse for the land the judge could and should have decided that it was an agricultural holding. In the present case there was evidence on which the judge could find that the cottage was an agricultural holding, and once it was established as a matter of law that a dwelling-house as such might be "land used for agriculture," it was difficult to see how any other conclusion could be reached. As to the landlord's first contention, which the judge upheld, if the second contract was expressed to be supplemental to the main contract, there was no reason why a "contract of tenancy" in s. 1 (1) should not be the original contract as so modified. The appeal should be dismissed.

BIRKETT, L.J., said that the questions were: (1) Could the separate contracts of tenancy made at different times be regarded as a contract of tenancy within s. 1 (1), and (2) could the cottage and garden by itself be regarded as agricultural land within s. 1 (2) so as to be an agricultural holding? On the first question, there were two separate tenancies, and the language of s. 1 (1) imported only a single tenancy, so that the cottage and the farm together could not constitute an agricultural holding. On the second point, the judge had taken into consideration the use to which the cottage had been put at all times; the fact that it had been always occupied by a farm worker stamped the cottage with a definite character. The judge had been right in answering the first question in the negative and the second question in the affirmative.

ROMER, L.J., delivered a judgment agreeing with the conclusions of Birkett, L.J. Appeal dismissed.

APPEARANCES: *A. G. de Montmorency* (*Bulcraig & Davis*); *E. P. Wallis-Jones* (*Hollest, Mason & Nash*, Farnham).

[Reported by F. R. DYMOND Esq., Barrister-at-Law] [3 W.L.R. 62

QUEEN'S BENCH DIVISION

MORTGAGE OF LEASEHOLDS BY WAY OF LEGAL CHARGE: MORTGAGEE'S RIGHT TO RELIEF AGAINST FORFEITURE

Grand Junction Co., Ltd. *v.* Bates and Another

Upjohn, J. (sitting as an additional judge of the Queen's Bench Division). 12th May, 1954

Action and counter-claim.

A lease originally granted by the plaintiff company to the second defendant was assigned by him to the first defendant together with furniture for the sum of £2,500, £1,150 of which was secured by a legal charge in favour of the second defendant. The latter had possession of the basement as a temporary arrangement for which he paid the first defendant £3 10s. a week; this payment was referred to as rent in the receipts. This letting was without the knowledge of the plaintiffs, and as the second defendant used his own furniture it did not come within the clause in the lease permitting the letting of furnished dwellings only. The first defendant was twice convicted of using the premises for immoral purposes, and the plaintiffs brought proceedings claiming possession for breach of covenant. The first defendant did not enter an appearance and judgment was signed against her. The second defendant claimed relief against forfeiture under s. 146 (4) of the Law of Property Act, 1925.

UPJOHN, J., said that the principal question was whether, by virtue of his mortgage, the second defendant was a person entitled to claim as an underlessee; the point was a fine one, not free from difficulty. It was conceded that if the mortgage had been by way of sub-demise, the second defendant would have fallen fairly and squarely within the ambit of s. 146 (4). The question had been considered in one case, *In re Good's Lease* [1954] 1 W.L.R. 309; *ante*, p. 111, in which Harman, J., had indicated that if a guarantor had only been entitled to call for a charge by way of legal mortgage of a leasehold, he would nevertheless have been entitled to claim the benefit of s. 146. By s. 87 (1) the mortgagee had the same "protection, powers and remedies" as though he had a sub-demise. A mortgagee by sub-demise undoubtedly had the right to protect his mortgage, where it was of a term of years, by applying for relief under s. 146. That was a most important right possessed by a mortgagee by sub-demise, for it might be the only way of saving his security in the hands of some insolvent lessee. The effect of s. 87 was to give the mortgagee by way of legal charge this same right, because he had the same protection as though he were an under-lessee. The second defendant was by virtue of s. 87 (1) of the Act, therefore, entitled to relief against forfeiture, and being a suitable person to whom relief should be granted, an order should be made vesting the lease in him. It was unnecessary in the circumstances to consider the true nature of the occupation of the basement, but in case this decision was appealed he would express his opinion that the position of the second defendant as occupant was that of underlessee and not of licensee to the first defendant; but he would not have been entitled to relief against forfeiture under s. 146 (4), as the sub-tenancy was confined to the basement of the premises and was in continuing breach of the terms of the lease. The order vesting the premises in the second defendant was without prejudice to any rights which the first defendant might have, and on terms that the second defendant paid nominal damages of £10 for allowing the premises to be used as a brothel and £168 damages for breach of the covenant to repair. Judgment on counter-claim for the second defendant.

APPEARANCES: *Cecil Binney* (*Bellamy, Bestford & Co.*); *C. D. Ellison Rich* and *Miss Deborah Rowland* (*Wegg-Prosser and Co.*).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] [3 W.L.R. 45

HABEAS CORPUS: APPLICANT SERVING LAWFUL SENTENCE

***In re* Corke.**

Lord Goddard, C.J., and Slade, J. 28th May, 1954

On 23rd April, 1954, the applicant, William Corke, was convicted by a Bow Street magistrate on a charge of being a suspected person loitering with intent, and was sentenced to three months' imprisonment. He did not appeal against his conviction, but while serving his sentence forwarded to the court an affidavit asking for a writ of habeas corpus, his complaint being that he was wrongfully convicted or convicted on perjured evidence.

LORD GODDARD, C.J., said that persons serving sentences passed upon them by a competent court of summary jurisdiction should understand that habeas corpus was not a means of appeal. If they complained that they were wrongly convicted, they should appeal to quarter sessions. A person convicted by a competent court of summary jurisdiction could not apply for a writ of habeas corpus. It had always been the law as laid down by Wilmot, C.J., in giving his opinion on the writ of habeas corpus (Wilmot's Notes of Opinions and Judgments (1802), p. 77 *et seq.*), that a writ of habeas corpus was a writ of right and not a writ of course. That meant that, before a writ could issue or leave could be given to apply for a writ, an affidavit must be before the court showing some ground on which the court could see that the applicant might be unlawfully detained. In the present case the applicant was lawfully in custody, serving a lawful sentence, and his application for a writ of habeas corpus was therefore refused. Application refused.

[Reported by Miss J. F. LAMB, Barrister-at-Law] **[1 W.L.R. 899**

SURVEY OF THE WEEK

ROYAL ASSENT

The following Bills received the Royal Assent on 4th June :—

Agriculture (Miscellaneous Provisions)
Army and Air Force (Annual)
Ashridge (Bonar Law Memorial) Trust
Atomic Energy Authority
Caernarvon Corporation
Coroners
Crewe Corporation
Dundee Corporation (Water Transport Finance &c.) Order Confirmation
Falmouth Docks
Forth Road Bridge Order Confirmation
Glasgow Corporation Order Confirmation
Law Reform (Enforcement of Contracts)
Law Reform (Limitation of Actions, &c.)
Metropolitan Common Scheme (Ham) Amending Scheme Confirmation
Pool Betting
Protection of Birds
Rhodesian Selection Trust Limited and Associated Companies
Rutherglen Burgh Order Confirmation
Shrewsbury Estate
Superannuation (President of Industrial Court)
Supreme Court Officers (Pensions)
Tyne Improvement
Wankie Colliery

HOUSE OF LORDS

A. PROGRESS OF BILLS

Read First Time :—

Civil Defence (Armed Forces) Bill [H.L.] [1st June.

To provide for the training in Civil Defence of persons serving terms of part-time service under the National Service Act, 1948, and other members of the Armed Forces of the Crown, and to remove doubts as to the Civil Defence functions of members of those Forces; and for purposes connected with the matters aforesaid.

Housing (Repairs and Rents) (Scotland) Bill [H.C.] [3rd June.

Newport Corporation Bill [H.C.] [3rd June.

Read Second Time :—

Juries Bill [H.C.] [1st June.
Protection of Animals (Amendment) Bill [H.C.] [1st June.

Read Third Time :—

Derbyshire County Council Bill [H.L.] [3rd June.
London County Council (Holland House) Amendment Bill [H.L.] [1st June.
Orpington Urban District Council Bill [H.L.] 1st June.

B. DEBATES

On the committee stage of the **Law Reform (Limitation of Actions, &c.) Bill,** LORD SILKIN proposed that a judge in chambers should have power, in those cases of personal injury claims to which the new time limit of three years would apply, within a period of six years from the accrual of the cause of action, to grant leave for an action to be brought. He was particularly concerned about the type of case in which the seriousness of the injury was not manifest within three years. Lord Silkin referred to *Archer* v. *Catton & Co., Ltd.*, [*ante*, p. 337], wherein a person suffered injury by inhaling fibre dust over a period of years. It was only after considerable time that he was advised that his physical condition resulted from this dust and from the negligence of his employers in not preventing the dust. Judges exercised discretion to allow divorce petitions to proceed when long delay was satisfactorily explained—they were therefore quite capable of exercising a similar discretion in cases of personal injuries. They would have to decide (*a*) whether the delay was unreasonable, and (*b*) whether it had unduly prejudiced the proposed defendants.

The LORD CHANCELLOR said the amendment would attack the fundamental benefits of statutes of limitation—the elimination of uncertainty. LORD HAILSHAM said the three-year period had worked perfectly well as regards the nationalised corporations. The amendment was withdrawn. [1st June.

HOUSE OF COMMONS

A. PROGRESS OF BILLS

Read First Time :—

Edinburgh Corporation Order Confirmation Bill [H.C.] [31st May.

To confirm a Provisional Order under the Private Legislation Procedure (Scotland) Act, 1936, relating to Edinburgh Corporation.

Gas and Electricity (Borrowing Powers) Bill [H.C.] [3rd June.

To increase the limits imposed by Section thirty-nine of the Electricity Act, 1947, on the amount outstanding in respect of borrowings of the British Electricity Authority and area electricity boards and by Section forty-two of the Gas Act, 1948, on the amount outstanding in respect of borrowings of the Gas Council and area gas boards.

Read Second Time :—

Mersey Docks and Harbour Board Bill [H.L.] [31st May.
Summary Jurisdiction (Scotland) Bill [H.L.] [2nd June.

In Committee :—

Television Bill [H.C.] [1st June.

B. QUESTIONS

LEGAL AID SCHEME

The ATTORNEY-GENERAL said that the Lord Chancellor had considered the third Annual Report of The Law Society on the operation and finance of the Legal Aid Scheme. No decision had yet been reached about the recommendations of the Advisory Committee which accompanied the Report. [31st May.

CONVEYANCES (STAMP DUTY)

Mr. BOYD-CARPENTER declined a suggestion that, in order to encourage house ownership, he should abolish or reduce the stamp duty on properties up to £2,500 in value. He pointed out that in 1952 concessions had been introduced on sales of property, other than stocks and securities, which gave preferential treatment for stamp duty where the price did not exceed £3,450.

[1st June.

STATUTORY INSTRUMENTS

Chelmsford Water Order, 1954. (S.I. 1954 No. 694.)
County of Inverness (Gargask Burn) Water Order, 1954. (S.I. 1954 No. 713 (S. 81).) 5d.
Exchange Control (Prescribed Securities) Order, 1954. (S.I. 1954 No. 711.)
Flour Mills (Hours, Safety and Welfare) Revocation Order, 1954. (S.I. 1954 No. 714.)
Hydrocarbon Oil Duties (Drawback) (No. 1) Order, 1954. (S.I. 1954 No. 709.)
London Traffic (Prescribed Routes) (No. 10) Regulations, 1954. (S.I. 1954 No. 723.)
Marriages Validity (All Saints' Church, West Ham) Order, 1954. (S.I. 1954 No. 710.)
National Health Service (Angus Hospitals Endowments Scheme) Approval Order, 1954. (S.I. 1954 No. 688 (S. 77).) 6d.
National Health Service (County and City of Perth General Hospitals Endowments Scheme) Approval Order, 1954. (S.I. 1954 No. 690 (S. 79).) 6d.
National Health Service (Dundee General Hospitals Endowments Scheme) Approval Order, 1954. (S.I. 1954 No. 689 (S. 78).) 8d.
National Health Service (Orkney Hospitals Endowments Scheme) Approval Order, 1954. (S.I. 1954 No. 683 (S. 75).) 6d.
National Health Service (Shetland Hospitals Endowments Scheme) Approval Order, 1954. (S.I. 1954 No. 684 (S. 76).) 6d.
Prohibition of Landing of Swine from Northern Ireland Order, 1954. (S.I. 1954 No. 722.)
Prohibition of Landing of Swine from the Channel Islands Order, 1954. (S.I. 1954 No. 721.)
Rope, Twine and Net Wages Council (Great Britain) Wages Regulation (Amendment) Order, 1954. (S.I. 1954 No. 693.) 6d.
Royal Irish Constabulary (Widows' Pensions) Regulations, 1954. (S.I. 1954 No. 703.) 6d.
Safeguarding of Industries (List of Dutiable Goods) (Amendment No. 6) Order, 1954. (S.I. 1954 No. 704.) 5d.
Sheriff Courts (Lanarkshire) Order, 1954. (S.I. 1954 No. 712 (S. 80).)
Stopping up of Highways (County Borough of Southampton) (No. 2) Order, 1954. (S.I. 1954 No. 685.)
Stopping up of Highways (London) (No. 7) Order, 1954. (S.I. 1954 No. 686.)
Stopping up of Highways (London) (No. 23) Order, 1954. (S.I. 1954 No. 702.)
Trustee Savings Banks (Rate of Interest) Order, 1954. (S.I. 1954 No. 729.)

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 102–3 Fetter Lane, E.C.4. The price in each case, unless otherwise stated, is 4d., post free.]

POINTS IN PRACTICE

Agricultural Holdings—Increase of Rent by Negotiation

Q. Clients of ours who own farms in this district are desirous of raising the rents of these farms as soon as possible. In almost every case the tenancies are yearly tenancies from the 2nd February. There seems to be no form laid down in the Agricultural Holdings Act, 1948, for the raising of rent. Section 8 of that Act does, of course, give the right of arbitration on this point, but we are wondering whether it is possible to raise the rent other than by arbitration if the tenant agrees. We propose to write to each tenant telling him that it is the landlords' desire that his rent should be raised by so much as from 2nd February, 1955, and to add that if he does not agree then the matter will have to go to arbitration under s. 8 of the 1948 Act. We propose to enclose with the letter a memorandum for signature by the tenant, stating that he agrees with the proposed increase and that the consideration for his agreement is that the landlords shall not take the matter to arbitration. Would such procedure promote an effective increase of rent or do you consider that there is no other way of putting up the rent than by arbitration under s. 8 of the Agricultural Holdings Act, 1948 ?

A. The Act does not provide for the observance of any particular procedure in such cases, but clearly, in our opinion, contemplates and sanctions (if sanction be necessary) increases agreed by negotiation. This is implicit in para. (*b*) of subs. (3) of the section, the effect of which is that when an increase is made ("under this section *or otherwise*") there can be no change, as the result of arbitration, for three years. The position is, therefore, that if the tenants do not agree an increase as proposed, the landlord can, by a reference to arbitration, seek to obtain an increase as from 2nd February, 1955 (whether the arbitration proceedings and award were held and took place before 2nd February, 1954, or not), but that after that there could be no increase or reduction by arbitration which would take effect before 2nd February, 1958. Whereas, if the tenants agreed to an increase as from 2nd February, 1954, they could later on seek a reduction, or the landlord could seek a further increase, effective from 2nd February, 1957. (The subject was discussed in our "Landlord and Tenant Notebook" at 97 Sol. J. 564.) We do not think that there would be any point in making the not taking the matter to arbitration the consideration for the increase; negotiation by agreement would, as pointed out, automatically exclude the possibility of increase by arbitration award, so refraining from such would be no consideration. No particular consideration is necessary for a variation of rent; *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.* [1947] K.B. 130 would provide ample authority for the proposition that the increases were enforceable.

Questions, which can only be accepted from practising solicitors who are subscribers either directly or through a newsagent, should be addressed to the "Points in Practice" Department, The Solicitors' Journal, 102-103 Fetter Lane, London, E.C.4.

They should be **brief, typewritten in duplicate,** and accompanied by the name and address of the sender **on a separate sheet,** together with a **stamped addressed envelope.** Responsibility cannot be accepted for the return of documents submitted, and no undertaking can be given to reply by any particular date or at all.

Landlord and Tenant—Damage by Lorry Delivering Goods to Tenant

Q. A British Transport lorry, when entering a warehouse to deliver goods to the tenant, did damage to the entrance gates. The landlord has had the damage made good, but the tenant not only declines to pay the cost but refuses to vouchsafe any information on the matter. We shall be obliged by your views as to liability and the action to be taken to recover the damages.

A. The tenant may be liable to the landlord for damages for breach of some repairing covenant, but there is very little authority to show how damages are to be measured when the landlord covenantee effects the repairs himself, and what there is suggests that substantial damages will not be awarded because there is no disrepair when the action is brought (*Williams* v. *Williams* (1874), L.R. 9 C.P. 659). It is, however, possible, in our opinion, that discouraging utterances of Coleridge, L.C.J., in that case should be considered *obiter dicta*, the action being one by a mesne lessor who was threatened with forfeiture and whose motives were consequently mixed against an underlessee; and in the case put, if the landlord were not only permitted but also requested, or at least encouraged, to repair the gates, we consider that the cost of repairs would fairly represent the measure of damages. If there be no repairing covenant, the tenant is not in any way liable; *dicta* in *Paradine* v. *Jane* (1647), Aleyn 26, to the effect that damage done by a third party is not waste, have always been accepted as sound law; *cf.* any recognised definition of waste. Nor is there, as the means of identifying the property cannot be said to be impaired, in our view, any possibility of basing a claim for waste on the refusal to vouchsafe information (see *Jones* v. *Chappell* (1875), L.R. 20 Eq. 539). But, while it may be that the explanation of the tenant's reticence is that some negligence of his (e.g., in volunteering to pilot the driver) caused or contributed to the accident, *prima facie* the landlord has a claim against the British Transport Commission for injury to the reversion (*Alston* v. *Scales* (1832), 9 Bing. 3; *Tucker* v. *Newman* (1839), 11 Ad. & El. 40).

NOTES AND NEWS

Honours and Appointments

Mr. CHARLES ARTHUR OVENS, solicitor, of Princes Risborough, has been appointed Registrar of Births and Deaths for the Princes Risborough Sub-District (Aylesbury, Bucks) in succession to Mr. R. Bailey, who has retired from the position.

SOCIETIES

Mr. Thomas Ley Chalton has been appointed president of LEEDS INCORPORATED LAW SOCIETY in succession to Mr. W. S. Theaker.

Lt.-Col. E. C. B. Edwards has been elected president of ESSEX LAW SOCIETY, of which his late father was the first president.

The UNION SOCIETY OF LONDON announce the following subject for debate in June: Wednesday, 16th: "That this country deserves a better Government." Wednesday, 23rd: annual general meeting. The next meeting will be held on Wednesday, 6th October. Meetings are held in the Common Room, Gray's Inn, at 8 p.m.

CASES REPORTED IN VOL. 98

20th March to 12th June, 1954

For cases reported up to and including 13th March, see *ante*, p. 184.

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